***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

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# Court of Appeals, District of Columbia

**JANUARY TERM, 1910.**

**No. 2093.** 687

**No. 4, SPECIAL CALENDAR.**

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

*vs.*

WASHINGTON RAILWAY AND ELECTRIC COMPANY, A BODY CORPORATE.

IN ERROR TO THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

**FILED NOVEMBER 24, 1909.**

# Court of Appeals, District of Columbia

**JANUARY TERM, 1910.**

## No. 2093.

**No. 4, SPECIAL CALENDAR.**

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

*vs.*

WASHINGTON RAILWAY AND ELECTRIC COMPANY, A BODY CORPORATE.

IN ERROR TO THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

**INDEX.**



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 27, 1909.
[4252]

# In the Court of Appeals of the District of Columbia.

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No. 2093.

UNITED STATES OF AMERICA, Plaintiff in Error,
vs.
WASHINGTON RAILWAY AND ELECTRIC CO., a Body Corporate.

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a In the Police Court of the District of Columbia, November Term, A. D. 1909.

No. 163,950.

UNITED STATES OF AMERICA
vs.
THE WASHINGTON RAILWAY AND ELECTRIC COMPANY, a Body Corporate, Defendant.

*Bill of Exceptions.*

Be it remembered that in the Police Court of the District of Columbia, at the city of Washington, in said District, at the times hereafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to-wit:

1 In the Police Court of the District of Columbia, May Term, A. D. 1909.

DISTRICT OF COLUMBIA, *ss:*

The Interstate Commerce Commission, by Daniel W. Baker, Esquire, Attorney of the United States in and for the District of Columbia, who, through Ralph Given, Esquire, one of his assistants, prosecutes for and on behalf of the said Interstate Commerce Commission, comes here into court, at the District aforesaid, on the seventeenth day of July, in the year of our Lord one thousand nine hundred and nine, in the said term, and for the said Interstate Commerce Commission gives the Court here to understand and be informed, on the oath of one Ernest E. Briscoe, that the Washington Railway and Electric Company, a body corporate, late of the District aforesaid, on the eighth day of April, in the year of our Lord one thousand nine hundred and nine, was a corporation controlling and operating a certain street railroad in the District of Columbia, and on the day and year last aforesaid, and at the District aforesaid, did oper-

ate and run certain cars over and upon said railroad on certain streets in said District, and in so operating said cars, did unlawfully permit a certain car so being operated by it over said railroad, to be crowded by persons desirous of the use of the same, and did thereby unlawfully fail to operate the said cars on said railroad so as to give passage to all persons desirous of the use of said cars, without crowding the same; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

*Second Count.*

And the Interstate Commerce Commission aforesaid, by the said Daniel W. Baker, Esquire, Attorney of the United States in
2 and for the District of Columbia, as aforesaid, who, through the said Ralph Given, Esquire, one of his assistants, as aforesaid, prosecutes for and on behalf of the said Interstate Commerce Commission, as aforesaid, comes here into court, as aforesaid, at the District aforesaid, on the said seventeenth day of July, in the year last aforesaid, in the said term, and for the said Interstate Commerce Commission gives the Court here further to understand and be informed, on the oath of the said Ernest E. Briscoe, that the said Washington Railway and Electric Company, a body corporate, as aforesaid, on the said eighth day of April, in the year last aforesaid, was a corporation controlling and operating said street railroad in the District of Columbia, and on the day and year last aforesaid, and at the District aforesaid, did then and there operate and run said cars over and upon said railroad on said streets in said District, and in so operating said cars, did unlawfully fail to operate the same on said railroad in such manner as to give passage to all persons desirous of using said cars without crowding the same, and did unlawfully permit the said cars so being operated by it over the said railroad to be crowded by persons desirous of using the same; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

Whereupon, the said Attorney of the United States, who, in this behalf, prosecutes for and on behalf of the said Interstate Commerce Commission, in manner and form aforesaid, prays the consideration of the Court here in the premises, and that due proceedings may be had against the said Washington Railway and Electric Com-
3 pany, a corporation, as aforesaid, in this behalf, and to make such corporation answer to the said United States touching and concerning the premises aforesaid.

DANIEL W. BAKER,
*Attorney of the United States in and for the District of Columbia,*
By RALPH GIVEN,
*His said Assistant.*

Personally appeared Ernest E. Briscoe before me this seventeenth day of July, A. D. 1909, and being duly sworn according to law, doth

declare and say that the facts as set forth in the foregoing information are true.

RALPH GIVEN,
*Assistant Attorney of the United States*
*in and for the District of Columbia.*

Filed Jun- 30, 1909.

[Seal Police Court, District of Columbia.]

F. A. SEBRING,
*Clerk Police Court, D. C.*

[Endorsed:] No. 163,950. United States vs. Washington Railway and Electric Company, a body corporate. Violation of act of Congress approved May 23, 1908. Witness: Ernest E. Briscoe. Filed Jun- 30, 1909. F. A. Sebring, Clerk Police Court, D. C.

4 In the Police Court of the District of Columbia, May Term, A. D. 1909.

No. 163,950.

THE UNITED STATES
vs.
WASHINGTON RAILWAY & ELECTRIC COMPANY.

Now come J. J. Darlington and George P. Hoover, attorneys for the defendant in the above entitled cause, and enter their appearance specially therein, for the purposes only of this motion, and, on behalf of said defendant, say, that this Court is without jurisdiction in the premises, and move the Court to quash the information filed therein because the said Court is without said jurisdiction for the following reasons:

1. Because the said proceeding is founded upon Section 16 of an Act of Congress of the United States entitled:

"An Act Authorizing certain extensions to be made of the lines of the Anacostia and Potomac River Railroad Company, the Washington Railway and Electric Company, the City and Suburban Railway of Washington, and the Capital Traction Company, in the District of Columbia, and for other purposes,"

said Act approved May 23, 1908; and this defendant further says that the said Section 16 provides as follows:

"SEC. 16. That every street railroad company or corporation owning, controlling, leasing or operating one or more street railroads within the District of Columbia shall on each and all of its railroads supply and operate a sufficient number of cars, sanitary, in good repair, with proper and safe power, equipment, appliances and service, comfortable and convenient, and so operate the same as to give expeditious passage, not to exceed fifteen miles per hour within the city limits or twenty miles per hour in the suburbs, to all persons desirous of the use of said cars, without crowding said cars. The Inter-

state Commerce Commission is hereby given power to require
5 and compel obedience to all of the provisions of this section, and to make, alter, amend and enforce all needful rules and regulations to secure said obedience; and said Commission is given power to make all such orders and regulations necessary to the exercise of the powers herein granted to it as may be reasonable and proper; and such railroad companies or corporations, their officers and employees, are hereby required to obey all the provisions of this section, and such regulations and orders as may be made by said Commission. Any such company or corporation, or its officers or employees, violating any provision of this section, or any of the said orders or regulations made by said Commission, or permitting such violation, shall be punished by a fine of not more than one thousand dollars. And each day of failure or neglect on the part of such company or corporation, its officers or employees, to obey each and all of the provisions and requirements of this section, or the orders and regulations of the Commission made thereunder, shall be regarded as a separate offense."

And this defendant further says that, according to the necessary interpretation of said Section, it will be liable to a fine of $1,000. on each day of failure or neglect on its part to obey each or all of the provisions and requirements of said Commission made thereunder; and this defendant further says that under the said provisions it will be liable for a fine of $1,000. on each day upon which it is unable or fails to comply with any one of said provisions and to an additional sum of $1,000. on the same day for each additional inability or failure to comply with others of the said provisions, so that the minimum of fines on a given day will be limited only by the specific classes of regulations which it shall be unable or fail to comply with; and the defendant further says that these fines and penalties, which would amount to a minimum of $365,000. in each year, would be and are confiscatory; and the defendant further says that the aforesaid penalties for said disobedience are by fines so enormous, as, not only to be confiscatory of the property of the defendant, but to
6 intimidate the defendant and its officers from resorting to the courts to test the validity of any of the requirements of the said Section or of any regulations which may be made by the Interstate Commerce Commission under the provisions thereof; and the defendant further says that the said Section of the said Act authorizes the imposition of cumulative penalties each of which may be of the amount of $1,000., and that said penalties may be inflicted not only upon the defendant but upon each and every of its officers and employees failing to comply with any one of the said provisions of the said Act or of any regulation of the Interstate Commerce Commission made thereunder.

2. And the defendant further says that the said information should be quashed because the same is not founded upon any rule, order or regulation of the Interstate Commerce Commission promulgated, prescribed, or adopted under the said Section 16 of the said Act; the defendant further says that the general language of the said Section of the said Act was intended only to announce certain general principles to be formulated into specific orders, rules and regula-

tions by the said Interstate Commerce Commission, which orders, rules and regulations, when properly made and prescribed, would constitute the provisions of law for the failure to obey which prosecution could be had at the instance of the said Interstate Commerce Commission; and the defendant further says in this connection that the language of the said Section of the said Act is so general and indefinite that it cannot in itself constitute a rule of conduct or of law.

3. And the defendant further says that the said information should be quashed because it says that one of the objects intended to be accomplished by the said Section 16 was the making and promulgation by the said Interstate Commerce Commission of

7 such rules, orders and regulations as would require each corporation, operating a street railroad within the District of Columbia, to supply and operate a sufficient number of cars, clean, sanitary, in good repair, with proper and safe power, equipment, appliances and service, comfortable and convenient, as to give expeditious passage, not to exceed fifteen miles per hour within the city limits or twenty miles per hour in the suburbs, to all persons desirous of the use of said cars, without crowding said cars. This defendant says that the offense intended to be constituted by the said language and to be properly set forth in a regulation or order of the said Interstate Commerce Commission was and is, not the crowding of any particular car, but the failure on the part of any street railway company to supply and operate a sufficient number of cars to give expeditious passage without crowding said cars; and the defendant further says that the manifest object of the said language of the said Section was to empower the Interstate Commerce Commission to ascertain and establish a certain service of the said cars with respect to the needs of the public under such schedules as to afford a sufficient number of cars to give the public expeditious passage without crowding, and not to penalize the company because of the voluntary or wilful crowding by the public or a part thereof of a particular car when there were at the same time other cars at legally prescribed and reasonable distance from each other which the said public could have occupied without crowding had they so desired. And the said defendant further says that it is a matter of official and general cognizance, recognized by the prosecuting informer, the Interstate Commerce Commission, in Public Document H. R. No. 1336, Sixtieth Congress, Second Session, being

"Report of the Interstate Commerce Commission on the

8 street railroads in the District of Columbia," dated January 18, 1909, that everywhere, both in this country and abroad, except in France where it is a penal offense for a passenger to enter into a public conveyance of the kind where every seat is filled, the question of overcrowding cars is one which the authorities have been endeavoring to solve and remedy, but that, as a matter of fact, despite all orders and regulations, the condition in question has not yielded to any solution which it has been possible to arrive at and is in fact incapable of solution until the law shall have made it a penal offense for any passenger to insist upon boarding a car which

is legally filled, to wit, a car which already contains the number of passengers which the law permits.

4. And the defendant further says that the said information should be quashed because even if the offense sought to be charged by the information can be said to be an offense contemplated and described by the said Section of the said Act, nevertheless, it would be incumbent upon the Interstate Commerce Commission, before causing any prosecution to be had for a violation of the provision requiring the defendant to supply and operate a sufficient number of cars and so operate the same as to give expeditious passage to all persons desirous of the use of said cars without crowding said cars, to determine and prescribe, *first*, what, within the meaning of the said Section of the said Act, will fairly constitute expeditious passage; and *secondly*, the number of persons allowable in cars of the several sizes and capacity in use by the defendant, the number of persons who can be accom-odated standing in the aisles of said cars and upon the platforms thereof as constituting the legal capacity of said
9 cars to prevent crowding, all for the purpose only of ascertaining and prescribing by appropriate regulations the number of cars which should be supplied and upon which schedules they should be operated by the said company.

J. J. DARLINGTON,
GEO. P. HOOVER,
*Attorneys for Defendant.*

Filed Jun- 30, 1909.

[Seal Police Court, District of Columbia.]

F. A. SEBRING,
*Clerk Police Court, D. C.*

[Endorsed:] In the Police Court of the District of Columbia. The United States vs. Washington Railway & Electric Company. No. 163950. Motion to quash. The Clerk will please file. J. J. Darlington, Geo. P. Hoover, Att'ys for Defendant. Filed Jun- 30, 1909. F. A. Sebring, Clerk, Police Court, D. C.

10 In the Police Court of the District of Columbia, September Term, A. D. 1909.

No. 163950.

UNITED STATES OF AMERICA
vs.
THE WASHINGTON RAILWAY AND ELECTRIC COMPANY, a Body Corporate, Defendant.

(*Opinion of Court.*)

11 This is a motion to quash five informations, each charging an offense under Section Sixteen of the Act of Congress approved May 23, 1908. The informations by agreement have been consolidated. The Section in question is as follows:

"That every street railroad company or corporation owning, controlling, leasing or operating one or more street railroads within the District of Columbia shall on each and all of its railroads supply and operate a sufficient number of cars, clean, sanitary, in good repair, with proper and safe power, equipment, appliances and service, comfortable and convenient, and so operate the same as to give expeditious passage, not to exceed fifteen miles per hour within the city limits or twenty miles per hour in the suburbs, to all persons desirous of the use of said cars, without crowding said cars. The Interstate Commerce Commission is hereby given power to require and compel obedience to all of the provisions of this section, and to make regulations to secure said obedience; and said Commission is given power to make all such orders and regulations necessary to the exercise of the powers herein granted to it as may be reasonable and proper; and such railroad companies or corporations, their officers and employees, are hereby required to obey all the provisions of this section, and such regulations and orders as may be made by said Commission. Any such company or corporation, or its officers and employees, violating any provision of this section, or any of said orders or regulations made by said Commission, or permitting such violation, shall be punished by a fine of not more than one thousand dollars. And each day of failure or neglect on the part of such company or corporation, its officers or employees, to obey each and all of the provisions and requirements of this section, or the orders and regulations of the Commission made thereunder, shall be regarded as a separate offense."

Four of the informations charge a violation of the provision, "in that the defendants did operate and run certain cars over and upon certain streets in said District and in so operating said cars did unlawfully permit a car to be crowded by persons desirous of the use of the same." The fifth information charges a violation of order or regulation number nine, of the Interstate Commerce Com-
12 mission, "in that the defendants operated a car equipped with wheels causing unnecessary noises commonly known as flat wheels." The motion is based chiefly upon two grounds:

1. Because the Act is unconstitutional in that the penalties for disobedience of the Section are by fines so enormous as, not only to be confiscatory of the property of the defendants but to intimidate the defendants and its officers from resorting to the courts to test the validity of any of the requirements of said Section or of any regulation which may be made by the Interstate Commerce Commission under the provisions thereof.

2. Because the general language of said section was intended only to announce certain principles to be formulated into specific orders, rules and regulations by said Commission, which orders, rules and regulations, when properly made and prescribed would constitute the provisions of law for the failure to obey which, prosecution could be had at the instance of said Commission and that the language of the Act is so general and indefinite that it cannot itself constitute a rule of conduct or of law.

The provision under which four of the informations are brought

requires the car companies (1) to supply a sufficient number of cars and (2) to so operate this supply of cars as to give expeditious passage to all persons desirous of the use of said cars without crowding. So even if the defendant did operate its cars without crowding it would still fail to obey the provision if it did not supply and operate a sufficient number of its cars for all persons desirous of the use of the same. Can it be claimed that it was the intention of Congress in using such indefinite terms to announce a rule of law that would subject the defendant or any of its employees to a penalty which might be one thousand dollars,
13 and make each day's failure to obey the provision a separate offense under a like penalty? How can these car companies, or any one else determine the number of persons desirous of using the cars or how many cars to supply and operate for all such persons on times and occasions which must necessarily be in the future and control-ed by circumstances impossible of anticipation?

Take the other provisions of the section: The sufficient number of cars must be "in good repair;" they must have "proper and safe power; proper and safe equipment and appliances; the service must be "comfortable and convenient." Is not each of these provisions so general and indefinite as to be incapable of enforcement until some rule or order is made determining the standard of "good repair;" the standard of "safe power and equipment and appliances" and some standard of "service comfortable and convenient" formulated into definite rules of conduct or of law. Consider the only provision in the section that might be said to be definite and enacted with any legal certainty, in that "the cars are not to exceed fifteen miles per hour within the city limits or twenty miles in the suburbs." Surely it was not the intention to allow these cars to go through the streets of the city at the rate of fifteen miles without any regard for the general traffic; but rather that this provision is intended to be simply a declaration on the part of Congress to be regulated and enforced by rules and orders of the Interstate Commerce Commission. This seems to be the view taken by the Commission for otherwise they have done a useless thing in reiterating in their regulation Number 4 that "no street cars shall move at a greater rate of speed than fifteen miles in the city; nor at a greater rate of speed than twenty miles in the suburbs of the city. Street cars shall not exceed a rate of speed greater than six miles, at street crossings," and in their report to Congress in Public Docu-
14 ment H. R. 1336, Sixtieth Congress, Second Session they use this language:

"The act itself seems to bear intrinsic evidence that it was not the purpose of the Congress to vest such authority in the Commission, our power being limited to the making of rules and regulations which shall insure a sufficient number of comfortable and convenient cars and their operation at such speed as to give expeditious passage."

And on page 15 of said report:

"The commission realizes that one of the principal requirements of the act under which the Interstate Commerce Commission has

proceeded was the remedying of the overcrowded condition of the cars, the exact language of the law being, "with proper and safe power, equipment, appliances, service, comfortable and convenient, * * * without crowding said cars.' Within a brief time after the Commission had undertaken the work imposed upon it by the Interstate Commerce Commission the question of operating cars without crowding was taken up, and for three or four months the matter has been a subject to which the commission has given its closest and most earnest attention. Reports received through the courtesy of the State Department from United States consuls in various European cities bearing upon the question of overcrowding cars have been received and considered, while correspondence has been entered into between the commission and the municipal authorities of more than twenty of the leading cities in this country with a view of learning, if possible, from the experience of those municipalities. The result of this investigation discloses the fact that in almost every city in this country and abroad, except in France, the question of overcrowding cars is one which the authorities have been endeavoring to solve and remedy, but that, as a matter of fact, despite all laws and regulations, the conditions which cause widespread complaint have not yet yielded to any solution which has been possible to bring to bear upon the situation."

If Congress intended that these provisions were to be treated as separate offenses why, then, was it necessary for the Act to confer power on the Commission not only to make rules and orders but power, "*to require and compel obedience*" to these very provisions? Does it not seem inconsistent for Congress to make a law to be enforced by a penalty and then say in terms: No this law need not be obeyed but we will confer power on a commission to require and compel obedience to it through rules and regulations and annex a penalty not to exceed one thousand dollars for a violation of any of these rules?

I hold, therefore, that in the provisions of this section Congress simply intended to lay down certain general principles which were to be enforced by reasonable rules and regulations of the Interstate Commerce Commission.

The other ground of the motion brings in question the validity of the statute on account of the penalties. Article 1, Section 2, of the Constitution of the United States provides: "That all fines shall be moderate and no cruel or unusual punishment shall be inflicted." Referring to the section—the penalty is a fine of *not more than one thousand dollars:* Now while it may be contended here that an excessive fine might be imposed for a technical violation, it would not be the statute that imposed it, but the court exercising a discretion with power to impose a fine as low as one cent and if the amount imposed is immoderate and unusual it is the judgment that is void and not the statute.

The general principle of law fixing the minimum punishment as the basis for testing the constitutionality of the Act is clearly

stated in volume 13 American and English Encyclopædia of Law, Second Edition, Page 60:

"Fines are to be fixed with reference to the objects which they are designed to accomplish and their imposition and regulation belong to the legislature. The courts cannot with reason or propriety question the action of the legislature or control or restrain its discretion in the matter of fixing the amount of a fine except where the minimum penalty is so plainly disproportioned to the offense or act which it is imposed as to shock the sense of mankind."

In ex parte Young, 209 U. S. Reports, page 123 the question of the validity of a statute on account of the penalties was passed upon. The State of Minnesota passed an act fixing certain freight charges and made it an offense for any agent or employee of a railroad to charge in excess of these rates under a penalty of imprisonment not exceeding ninety days in jail and by another section of the Act fixed a passenger rate at two cents a mile and declared that any railroad company or its employees selling a ticket in excess of this rate was subject to a fine not exceeding five thousand dollars or imprisonment not exceeding five years. Justice Peckham in his opinion holding the Act invalid said:

"It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute at least once, for the purpose of testing its validity without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all the approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of statute upon a subject, requiring no such investigation and over which the jurisdiction of the legislature is complete in any event."

Now considering the statute in question in the light of this rule, we have these provisions enforced by certain rules and orders of the Interstate Commerce Commission. The rules and regulations to be valid must be reasonable upon their face and would not depend upon

any fact that could only be determined after a judicial investigation of a technical character but would be the ordinary case of a statute upon a subject which would constitute a rule of conduct plain and clear that these defendants in the performance of their duty to the general public as common carriers in obeying, need not do acts which must necessarily result in their violation.

The motion, therefore, to quash the information No. 164272, charging a violation of a regulation of the Commission on the ground that the Act is unconstitutional, is overruled.

The motion to quash informations No. 163943, 163946, and 163950 charging a violation of the provision relating to the crowding of cars—is granted.

ALEX. R. MULLOWNY,
*Judge, Police Court.*

18 In the Police Court of the District of Columbia, November Term, A. D. 1909.

No. 163950.

UNITED STATES OF AMERICA
vs.
THE WASHINGTON RAILWAY AND ELECTRIC COMPANY, a Body Corporate, Defendant.

*Order Dismissing Information.*

This cause coming on to be heard upon the information filed on behalf of the United States and the motion to quash on behalf of the defendant herein, it is, this 9 day of Nov., A. D. 1909,

Ordered, Adjudged and Decreed: That the motion to quash be, and the same is hereby granted; and that the information in this case be, and the same is hereby dismissed.

ALEX. R. MULLOWNY,
*Judge of the Police Court of the District of Columbia.*

[Endorsed:] In the police court of the District of Columbia. United States of America vs. The Washington Railway and Electric Company, a body corporate, defendant. No. 163950. Order dismissing information.

19 Whereupon, counsel for the United States duly excepted to the ruling of the Court in allowing said motion to quash, and in dismissing the information, and said exception was duly noted by the Court on its minutes. Thereupon, counsel for the United States gave due notice in open court of an intention to apply to the Court of Appeals of the District of Columbia for a writ of error, and prayed the Court to sign and seal this, their bill of exceptions, which prayer is granted, and the Court accordingly signs and seals this bill of exceptions, this 9 day of Nov., A. D. 1909, *nunc pro tunc*.

ALEX. R. MULLOWNY,
*Judge of the Police Court of the District of Columbia.*

20 (*Copy of Docket Entries.*)

In the Police Court of the District of Columbia, May Term, A. D. 1909.

No. 163950.

UNITED STATES
vs.
WASHINGTON RAILWAY AND ELECTRIC COMPANY, a Body Corporate.

Information for Violation of Act of Congress Approved May 23, 1908.

Information filed Tuesday, May 18, 1909. Continued to May 19, 1909.

May 19, 1909: Defendant Company arraigned. Plea: Not guilty and jury trial demanded through its Secretary, Fred J. Whitehead. Continued to June 30, 1909.

June 30, 1909: Motion to withdraw plea made. Motion granted. Amended information filed by leave of Court first had and obtained.

Motion to quash information filed. Motion covers amended information. Term of Court continued for hearing on motion to quash.

November 9, 1909: Motion to quash information granted and information dismissed.

Exceptions taken to rulings of the Court on matters of law and notice given by the Attorney for the United States, on behalf of the United States, of his intention to apply to a Justice of the Court of Appeals of the District of Columbia for a writ of error.

Bill of exceptions presented, settled, signed, sealed and filed.

November 12, 1909: Writ of error received from the Court of Appeals of the District of Columbia.

21 In the Police Court of the District of Columbia.

UNITED STATES OF AMERICA,
*District of Columbia, ss:*

I, F. A. Sebring, Clerk of the Police Court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 20 inclusive, to be true copies of originals in cause No. 163950 wherein the United States is plaintiff and The Washington Railway and Electric Company, a body corporate, defendant, as the same remain upon the files and records of said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, the City of Washington, in said District, this 24th day November, A. D. 1909.

[Seal Police Court, District of Columbia.]

F. A. SEBRING,
*Clerk Police Court, Dist. of Columbia.*

[Endorsed:] No. 163950. United States of America vs. The Washington Railway and Electric Company, a body corporate, defendant. Transcript of record.

22 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Alexander R. Mullowny Judge of the Police Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Police Court, before you, between United States of America, plaintiff and Washington Railway and Electric Company, a body corporate, —. Information 163950 a manifest error hath happened, to the great damage of the said plaintiff as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 15 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Seth Shepard, Chief Justice of the said Court of Appeals, the 12th day of November, in the year of our Lord one thousand nine hundred and nine.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
*Clerk of the Court of Appeals*
*of the District of Columbia.*

Allowed by

SETH SHEPARD,
*Chief Justice of the Court of Appeals*
*of the District of Columbia.*

[Endorsed:] Filed Nov. 12, 1909. F. A. Sebring, Clerk Police Court, D. C.

Endorsed on cover: District of Columbia Police Court. No. 2093. United States of America, plaintiff in error, vs. Washington Railway and Electric Co., a body corporate. Court of Appeals, District of Columbia. Filed Nov. 24, 1909. Henry W. Hodges, clerk.

NO. 2093.

# In the Court of Appeals

## OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1910.

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UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

*vs.*

THE WASHINGTON RAILWAY AND ELECTRIC COMPANY, A BODY CORPORATE.

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## BRIEF FOR DEFENDANT IN ERROR.

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R. ROSS PERRY,
R. ROSS PERRY, JR.,
G. THOMAS DUNLOP,
*Counsel for the Capital Traction Company.*

J. J. DARLINGTON,
GEORGE P. HOOVER,
*Counsel for Washington Railway and Electric Company.*

THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

NO. 2093.

# In the Court of Appeals

## OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1910.

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UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

*vs.*

THE WASHINGTON RAILWAY AND ELECTRIC COMPANY, A BODY CORPORATE.

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## BRIEF FOR DEFENDANT IN ERROR.

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### A.

### Concise Statement of Facts.

The defendant in error, on the 15th day of July, 1909, in the United States branch of the Police Court of this city, before the Honorable Alexander R. Mullowny, was charged by information on behalf of the Interstate Commerce Commission, by Daniel W. Baker, Esquire, attorney for the United States in and for the District of Columbia, by one of his assistants, with unlawfully permitting a certain car operated by it, on the 8th day of April, 1909, over its railroad, to be crowded by persons desirous of the use of the cars, and did thereby unlawfully fail to operate the said cars on said railroad so as to give passage to all persons desirous of the use of said cars without crowding the same, against the form of the statute, etc.

And in a second count of the said information the defendant was also charged with unlawfully failing to operate its cars on the 8th day of April, 1909, on its railroad in such manner as to give passage to all persons desirous of using said cars without crowding the same; and with unlawfully permitting the said cars so being operated by it over the said railroad to be crowded by persons desirous of using the same, against the form of the statute, etc.

This prosecution was in pursuance of an act of Congress approved May 23, 1908, 35 Stat. at L., 250, sections 16 and 17 of which are as follows:

> "Sec. 16. That every street railroad company or corporation owning, controlling, leasing or operating one or more street railroads within the District of Columbia shall on each and all of its railroads supply and operate a sufficient number of cars, clean, sanitary, in good repair, with proper and safe power, equipment, appliances and service, comfortable and convenient, and so operate the same as to give expeditious passage, not to exceed fifteen miles per hour within the city limits or twenty miles per hour in the suburbs, to all persons desirous of the use of said cars, without crowding said cars. The Interstate Commerce Commission is hereby given power to require and compel obedience to all of the provisions of this section, and to make, alter, amend and enforce all needful rules and regulations to secure said obedience; and said Commission is given power to make all such orders and regulations necessary to the exercise of the powers herein granted to it as may be reasonable and proper; and such railroad companies or corporations, their officers and employees, are hereby required to obey all the provisions of this section, and such regulations and orders as may be made by said Commission. Any such company or corporation, or its officers or employees, violating any provision of this section, or any of the said orders or regulations made by said Commission, or permitting such violation, shall be punished by a

the condition of overcrowding of street-cars which the act attempted to remedy is in fact incapable of solution until the law shall have made it a penal offense for any passenger to insist upon boarding a car which is legally filled.

*Fourth.* That even if the offense sought to be charged by the information can be said to be an offense contemplated by the said act, nevertheless it would be incumbent upon the Interstate Commerce Commission, before causing any prosecution to be had for a violation of the provision requiring the defendant to supply and operate a sufficient number of cars, and so operate the same as to give expeditious passage to all persons desirous of the use of said cars, without crowding said cars, to determine and prescribe, first, what, within the meaning of the said section of the said act, will fairly constitute expeditious passage; and, second, the number of persons allowable in cars of the several sizes and capacities in use by the defendant, the number of persons who can be accommodated standing in the aisles of said cars and upon the platforms thereof as constituting the legal capacity of said cars to prevent crowding, all for the purpose only of ascertaining and prescribing by appropriate regulations the number of cars which should be supplied, and upon what schedules they should be operated.

B.

## Argument on the Law.

There being but one exception in the record, counsel for the defendant in error, who have not had an opportunity to see the brief of the appellant, take it for granted that there is but one assignment of error, namely, the granting by the court of the motion of the defendant below to quash the information.

upon any rule, order or regulation of the Interstate Commerce Commission promulgated, prescribed or adopted under the authority of the said act, and because the general language of the said act was intended only to announce certain general principles, which were to be formulated into specific orders, rules and regulations by said commission, which orders, rules and regulations, when properly made and prescribed, would constitute the provisions of law, for the failure to obey which prosecution could be had at the instance of said commission; and that the language of the act is so general and indefinite that it can not itself constitute a rule of conduct or of law.

*Third.* That the offense intended to be constituted by the language of the said section was and is not that charged in the information, namely, the crowding of any particular car, but the failure on the part of the company to supply and operate a sufficient number of cars to give expeditious passage without crowding said cars; and that the manifest object of the said language of the said section was to empower the Interstate Commerce Commission to ascertain and establish a certain service of the said cars, with respect to the needs of the public, under such schedules as to afford a sufficient number of cars to give the public expeditious passage, without crowding, and not to penalize the company because of the voluntary or willful crowding by the public, or a part thereof, of a particular car, when there were at the same time other cars at legally prescribed and reasonable distances from each other, which the said public could have occupied without crowding, had they so desired; and for the further reason that the Interstate Commerce Commission itself, in public document H R. No. 1336, Sixtieth Congress, second session, being "Report of the Interstate Commerce Commission on the street railroads in the District of Columbia," dated January 18, 1909, admitted and maintained that

the condition of overcrowding of street-cars which the act attempted to remedy is in fact incapable of solution until the law shall have made it a penal offense for any passenger to insist upon boarding a car which is legally filled.

*Fourth.* That even if the offense sought to be charged by the information can be said to be an offense contemplated by the said act, nevertheless it would be incumbent upon the Interstate Commerce Commission, before causing any prosecution to be had for a violation of the provision requiring the defendant to supply and operate a sufficient number of cars, and so operate the same as to give expeditious passage to all persons desirous of the use of said cars, without crowding said cars, to determine and prescribe, first, what, within the meaning of the said section of the said act, will fairly constitute expeditious passage; and, second, the number of persons allowable in cars of the several sizes and capacities in use by the defendant, the number of persons who can be accommodated standing in the aisles of said cars and upon the platforms thereof as constituting the legal capacity of said cars to prevent crowding, all for the purpose only of ascertaining and prescribing by appropriate regulations the number of cars which should be supplied, and upon what schedules they should be operated.

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## Act of Congress in Question is Unconstitutional.

While the court below granted the said motion to quash for the reasons stated in his opinion (Rec.,p. 6), namely, that the language of the act itself was so general and indefinite that it could not of itself constitute a rule of conduct or of law, but that it must be supplemented by rules and regulations of the Interstate Commerce Commission prescribing what, under all circumstances, was to be considered a sufficient number of cars, etc.; and while, on the other hand, the court also held that the act itself was not void, because, in his opinion, the vices could be cured by reasonable rules and regulations enacted by the Interstate Commerce Commission, nevertheless counsel respectfully submit that, aside from the reasons given by the court for sustaining the motion to quash, it should have been sustained, and should now be sustained because of the unconstitutionality of the statute. We shall take up that feature of the case first because it applies not only to this case but to the case which is argued with it, growing out of the same statute, and in which the defendant, the Capital Traction Company, is the complainant; the latter case being No. 2091 on the docket of this court.

In order to determine whether the act in question is unconstitutional for the four reasons set forth, it will be necessary in the first place to analyze its provisions, and in the second place to determine what its effect would be if enforced.

By a scrutiny of section 16 of the act itself, we observe the following:

The act provides at least twenty-four, if not more, separate and distinct offenses, as follows:

(1) Failure on the part of the defendant to "*supply*" a "*sufficient number*" of cars to give expeditious passage, etc., to all persons desirous of the use of said cars, without crowding said cars.

(2) Failure on the part of the defendant to "*operate*" a "*sufficient number*" of cars to give expeditious passage, etc., to all persons desirous of the use of said cars without crowding said cars.

(3) Failure on the part of the defendant to "*supply*" "*sanitary*" cars.

(4) Failure on the part of the defendant to "*operate*" "*sanitary*" cars.

(5) Failure on the part of the defendant to "*supply*" cars "*in good repair.*"

(6) Failure on the part of the defendant to "*operate*" cars "*in good repair.*"

(7) Failure on the part of the defendant to "*supply*" cars "*with proper power.*"

(8) Failure on the part of the defendant to "*operate*" cars "*with proper power.*"

(9) Failure on the part of the defendant to "*supply*" cars "*with safe power.*"

(10) Failure on the part of the defendant to "*operate*" cars "*with safe power.*"

(11) Failure on the part of the defendant to "*supply*" cars "*with proper equipment.*"

(12) Failure on the part of the defendant to "*operate*" cars "*with proper equipment.*"

(13) Failure on the part of the defendant to "*supply*" cars "*with safe equipment.*"

(14) Failure on the part of the defendant to "*operate*" cars "*with safe equipment.*"

(15) Failure on the part of the defendant to "*supply*" cars "*with proper appliances and service.*"

(16) Failure on the part of the defendant to "*operate*" cars "*with proper appliances and service.*"

(17) Failure on the part of the defendant to "*supply*" cars "*with safe appliances and service.*"

(18) Failure on the part of the defendant to "*operate*" cars "*with safe appliances and service.*"

(19) Failure on the part of the defendant to "*supply*" "*comfortable*" cars.

(20) Failure on the part of the defendant to "*operate*" "*comfortable*" cars.

(21) Failure on the part of the defendant to "*supply*" "*convenient*" cars.

(22) Failure on the part of the defendant to "*operate*" "*convenient*" cars.

(23) Failure on the part of the defendant to "*operate*" cars "*so as to give expeditious passage to all persons desirous of the use of such cars.*"

(24) The "*operation*" of its cars, or any of them, "*at a speed in excess of fifteen miles an hour within the city limits, or twenty miles an hour in the suburbs.*"

It will be noted that these are general offenses prohibited by the language of the act itself, but according to the interpretation of the act by the Interstate Commerce Commission, any one of these may be subdivided *ad infinitum* by regulations promulgated under the authority of the act by the said commission.

There is nothing in the act itself to put the defendant on notice as to what would be considered a "sufficient number" of cars, what would constitute "sanitary" cars, when cars are to be considered "in good repair," when the *power* is "proper" or "safe," whether "proper power" means adequate power or otherwise; when *equipment* is to be considered "proper" or "safe;" whether "proper" equipment is to be considered as adequate equipment, sufficient equipment, or otherwise; what, in fact, shall be considered "equipment" as distinguished from "appliances" and vice versa; when "appliances" and "service" are "proper" and "safe," what the term "service" is intended to cover; whether it is synonymous with "equipment" or "appliances," whether it refers to the conductors and motormen and other employees, or whether it applies to the schedules for the running of

cars provided by the company; and an infinite number of other questions. Nevertheless, the act proceeds to impose a penalty for the violation of each and all of these provisions, indefinite as they are, not only upon the corporation itself, but upon every officer and employee who may be found guilty.

The defendant in this case has, first, a president; second, a vice-president; third, a second vice-president; fourth, a secretary; fifth, a treasurer; sixth, a general manager; seventh, a superintendent of transportation; eighth, nine directors—or sixteen general officers in all. Inasmuch as every offense must be charged against some particular division of the company's lines, there is a division superintendent responsible; and inasmuch as every offense must be charged against some particular car, which is controlled by two employees (a conductor and a motorman), there are to be added to this number of responsible persons three more. The total of persons liable for prosecution under each offense is, therefore, nineteen (19) together with the defendant company, making twenty separate prosecutions.

The defendant operates, in round numbers, approximately one hundred and fifty cars, and a separate information might be filed for each of these offenses against each of the one hundred and fifty. It is, therefore, only a matter of arithmetic to show that on any one day in the year, 72,000 prosecutions may be brought under the act itself. This number multiplied by 365, the number of days in a year, will give us 26,280,000 as the number of prosecutions possible in a year under this statute.

**The Simple Statement of this Proposition is the Strongest Argument to Support the Contention that an Enforcement of this Act Would be Confiscatory.**

While a thousand dollars might be the punishment for each offense, it may be and in fact it has been contended that the court might impose a fine of only five dollars or

or one dollar. But even should the court be so lenient as to impose this minimum fine, the aggregate would be many times the entire value of the defendant's property every year.

So while it may be said that the penalty provided by the act of a thousand dollars for each offense is a maximum penalty, and that the court upon whom the duty may devolve of fixing the amount of the penalty might only impose a comparatively small fine of, say, $5, or even $1 for each offense (either of which would in itself be confiscatory), yet another judge might impose the maximum penalty provided by the law, in which case the total figures would be so stupendous as to be almost beyond computation. The question of what a judge might do does not determine the validity of the law. Its validity must be determined upon the face of the law itself and by what will happen in the event that the law is enforced in accordance with the terms contained in it. Should this law be held valid, the street railroad companies in this city would be faced with the possibility of prosecution any day, without any adequate notice of what is required of them in order to comply with the provisions of the act, for ~~$1,600~~ 12000 alleged offenses.

The case of Wilcox *vs.* Consolidated Gas Company, 212 U. S., page 19, which, as the court will recall, was lately passed upon by the United States Supreme Court, and was known as the "eighty-cent gas case," while the decision of the lower court in favor of the gas company, and against the act, was reversed on other grounds, is nevertheless instructive with respect to the constitutionality of this act, for the reason that its enormous penalties are confiscatory. In that case the law provided that the gas company should furnish gas to the city of New York and the borough of Manhattan for the sum of 75 cents per 1,000 cubic feet, and then empowered the gas commission to fix the rate at which the gas company

should furnish gas to its consumers; and in pursuance of that authority the commission fixed the rate at 80 cents per 1,000 cubic feet. In addition to that, the act provided that the gas company should comply with certain regulations stated in the law as to the pressure which should be maintained in the gas mains. The gas company went into the district court of New York and filed its bill for injunction, praying the court to restrain the operation of the law, because, among other reasons, the effect of the enforcement of the penalty clause would be confiscatory of the property of the defendant. In that case the law imposed a fine of $1,000 dollars for overcharging the customer, and also $1,000 for failure to comply with the regulation of law as to the pressure to be maintained in the mains. The opinion in the case in the Supreme Court of the United States was written by the late Mr. Justice Peckham, in the course of which the court say (p. 53):

> "If these provisions as to penalties have been properly construed by the court below, they are undoubtedly void, within the principle decided in Ex parte Young, 209 U. S., 123, and the cases there cited, because so enormous and overwhelming in their amount."

The "court below" was Mr. Justice Lacomb, of the circuit court in New York, who, in his opinion in this same case, reported in 146 Fed. Rep., at page 153, said:

> "In the act which provides that companies furnishing gas in the borough of Manhattan 'shall not charge or receive for gas manufactured, furnished or sold, . . . a sum per one thousand cubic feet in excess of . . . eighty cents,' we find the following: 'Section 3. Any corporation, association, copartnership or person violating any provision

of this act shall forfeit the sum of one thousand dollars for such offense to the people of the State.'

"The drastic character of these provisions will be perceived when their results are considered. If the gas company, pending the final determination of a suit such as this to determine whether the Legislature has fixed a just and proper price, should charge its consumers the lower rate and receive the same without protest or demand of payment at the higher rate, it could never recover the difference, even should it be decided by the court of last resort that it was entitled to demand such higher rate. Having delivered its product for the particular month and received the amount it asked for such product, that transaction would be finally closed. Both parties having agreed upon the price, without any reservation, it would be the contract price for that month's delivery, which the seller could not thereafter dispute. . . . The only course left for the gas company is to bring some direct suit, such as this, to test the constitutionality of the action of the gas commission and of the Legislature in fixing an eighty cent rate, and meanwhile to preserve its rights to the difference by demanding payment therefor, as each monthly bill is presented to each consumer. Long before this test suit could be heard next fall, the aggregate of penalties incurred would utterly wipe out the entire property of the complainant, whether it were worth the amount found by the gas commission, or were worth the highest estimate at which the most astute and experienced financiers might capitalize it."

After quoting from Cotting *vs.* Kansas City Stockyards Company, 183 U. S., 79, the court continues:

"It is difficult to see in what respect the provisions of the two acts now under consideration differ from those passed upon in the Kansas City stockyards case, except that they are perhaps more drastic. On this branch of the case there is

> no controversy as to the facts, and under the opinion last quoted, these provisions seem obnoxious to the Fourteenth Amendment to the Constitution of the United States."

In the case at bar, inasmuch as the defendant has no means of knowing beforehand what will constitute a compliance with the indefinite terms of the act in question, or when, or under what circumstances it may at any time be charged with a violation of any or all of these indefinite provisions, its only redress, as in the case quoted, is to invoke the aid of the court in determining the question of the constitutionality of the act. In the meantime, as is said in the case quoted, before the appeal can be reached and heard in the Supreme Court of the United States, or even in this court, the number of possible prosecutions or alleged offenses which will have accrued will be so enormous as that the imposition of any penalty whatever for each offense would be confiscatory.

When this so-called gas case came up for final hearing as to whether or not the injunction should be made final, the court, speaking by Mr. Justice Hough, 157 Fed. Rep., 881, say:

> "The master enters upon a computation of the effect of these penalty clauses in the case of a corporation having about 390,000 customers, and concludes that 'said penalties, so far as the evidence shows are unexampled in extent and severity.' This is but confirmation of the finding based on affidavits made when the preliminary injunction herein was granted. I think there is nothing to add to the statements of facts and law set forth in 146 Fed. Rep., 154. I am of the opinion that the penalty clauses in both statutes are clearly obnoxious to the remarks of Brewer, J., in Cotting *vs.* Kansas City Stockyards Co., 183 U. S., 79."

**The Penalties Provided by the Act Being Cumulative, the Tendency of the Act is to Intimidate the Defendant and its Officers from Resorting to the Courts to Test the Validity of its Requirements, or of any Regulations which may be made by the Interstate Commerce Commission Thereunder.**

It will possibly be asked: "Wherein do the provisions for cumulative fines complained of tend to intimidate the railroad companies from coming into court to test the validity of this law?" and it will be suggested that it is evident that such is not the tendency, for both street railway companies are, as a matter of fact, at present in court for the purpose of testing it. The answer to this suggestion is the very nature of the argument advanced in this brief, which it is necessary for the defendant to make against the validity of the law. For instance, it has been seen that, in order to demonstrate the unreasonableness of the law and the drastic character of the legislation complained of, it has been incumbent upon counsel herein to point out not only to the court, but for the benefit of the prosecuting authorities, the enormous and varied possibilities for prosecutions under the terms of this act. Does it not occur to the court that this is manifestly a very dangerous two-edged weapon? Analyzing the act for the purpose of showing that it is possible and feasible for the Interstate Commerce Commission to prosecute this defendant, its officers, and employees for approximately ~~30,000,000~~ 280,000 separate offenses in a single year, is certainly giving assistance to the prosecutor, from which any railroad company might reasonably be expected to shrink. The fact that the defendant in this instance has hazarded it, counsel regret to say, might be ascribed to the rashness or overconfidence of counsel rather than to the courage of the defendant, which would naturally be deterred from itself advancing the proposition even in argument that

26,000,000 prosecutions might be annually brought against it under this act.

The case of Cotting *vs.* Kansas City Stockyards Company, 183 U. S., page 79, was one in which the court had under consideration the validity of an act of the legislature of Kansas. That portion of the act dealing with the question of penalties was as follows:

> "That any person or persons violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined, for the first offense, not more than one hundred dollars; for the second offense not less than one hundred dollars nor more than two hundred dollars, and for the third offense not less than two hundred dollars nor more than five hundred dollars and by imprisonment in the county jail not exceeding six months for each offense; and for each subsequent offense he or they shall be fined in any sum not less than one thousand dollars and by imprisonment in the county jail not less than six months."

Mr. Justice Brewer, in delivering the opinion of the Supreme Court of the United States in that case, at page 100 of the report, says, with respect to this penalty clause:

> "In this feature of the case we are brought face to face with a question which legislation of other States is presenting. Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that upon a failure to make good that claim or defense, the penalty for such failure, either appropriates all his property, or subjects him to extravagant and unreasonable loss? Let us make some illustrations to suggest the scope of this thought.
>
> "Suppose a law were passed that if any laboring man should bring or defend an action and fail in his claim or defense, either in whole or in

part, he should, in the one instance, forfeit to the defendant half of the amount of his claim, and in the other, be punished by a fine equal to half of the recovery against him, and that such law by its terms applied only to laboring men, would there be the slightest hesitation in holding that the laborer was denied the equal protection of the laws? The mere fact that the courts are open to hear his claim or defense is not sufficient, if upon him and upon him alone, there is visited a substantial penalty for a failure to make good his entire claim or defense.

"Take another illustration: Suppose a statute that every corporation failing to establish its entire claim or make good its entire defense, should as a penalty therefor forfeit its corporate franchise, and that no penalty of any kind except the matter of costs was attached to like failures of other litigants, could it be said that the corporations received the equal protection of the laws?

"Take still another illustration: Suppose a law which, while opening the doors of the courts to all litigants, provided that a failure of any plaintiff or defendant to make good his entire claim or entire defense should subject him to a forfeiture of all his property or to some other great penalty; then, even if, as all litigants were treated alike, it could be said that there was equal protection of the laws, would not such burden upon all be adjudged a denial of due process of law?

"Of course, these are extreme illustrations, and they serve only to illustrate the proposition that a statute (although in terms opening the doors of the courts to a particular litigant) which places upon him as a penalty for a failure to make good his claim or defense a burden so great as to practically intimidate him from asserting that which he believes to be his rights, is, when no such penalty is inflicted upon others, tantamount to a denial of the equal protection of the laws."

The case of Ex parte Young, 209 U. S., page 123, cited by the Supreme Court in the gas case, was a case in which

the petitioner, Young, was the attorney-general of Minnesota. The legislature of the State of Minnesota passed an act dealing with the question of railroad rates, and fixing the maximum fare that railroads could exact from their passengers at two cents per mile, with other provisions in the law with respect to penalties. The railroad company, deeming that law to be unconstitutional, went into the United States district court with its bill in equity, praying for an injunction to restrain the State officers from enforcing that law. The petitioner in that case, Young, the attorney-general, after the temporary restraining order had been granted as against him and other defendants, ignored the restraining order and continued to prosecute, and was held guilty of contempt of court. He then came into the United States Supreme Court by writ of habeas corpus, asking for his discharge. The late Mr. Justice Peckham, in delivering the opinion of the court, dealing with the question of the penalty clause of the act of the legislature of Minnesota, said (p. 144):

> "Another Federal question is the alleged unconstitutionality of these acts because of the enormous penalties denounced for their violation, which prevent the railway company, as alleged, or any of its servants or employees, from resorting to the courts for the purpose of determining the validity of such acts. The contention is urged by the complainants in the suit that the company is denied the equal protection of the laws, and its property is liable to be taken without due process of law, because it is only allowed a hearing upon the claim of the unconstitutionality of the acts and orders in question, at the risk, if mistaken, of being subjected to such enormous penalties, resulting in the possible confiscation of its whole property, that, rather than take such risks, the company would obey the laws, although such

obedience might also result in the end (though by a slower process) in such confiscation. . . .

"Coming to the inquiry regarding the alleged invalidity of these acts, we take up the contention that they are invalid on their face, on account of the penalties. For disobedience to the freight act the officers, directors, agents and employees of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days. Each violation would be a separate offense, and therefore, might result in imprisonment of the various agents of the company who would dare disobey for a term of ninety days each for each offense.

"Disobedience to the passenger rate act renders the party guilty of a felony and subject to a fine not exceeding five thousand dollars or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment. The sale of each ticket above the price permitted by the act would be a violation thereof. It would be difficult, if not impossible, for the company to obtain officers, agents, or employees willing to carry on its affairs except in obedience to the acts and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the Commission. The company, in order to test the validity of the acts, must find some agent or employee to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts (either State or federal) for the purpose of testing its validity. The officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company. . . .

"We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers by imposing such

> enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."

Now we say that the law as a whole is absolutely void, because it is unconstitutional as a whole; because it prescribes penalties which are excessive and confiscatory, and which, when applied to particular classes of persons or of corporations, are unconstitutional, and will be so declared by any court whether in a criminal case or an equity case, or in a law case; are unconstitutional because they impose on persons who occupy a certain position of duty towards the public, as carriers do, acts which must necessarily result in violation of the law, and which must necessarily deter the corporation from going into court and testing the law. The corporation may have the courage to do it, as we have had, but what has that to do with principle? It is not that we have been deterred, but that persons occupying those relations generally may be deterred from going into court and having the judges judicially ascertain their rights. We are here saying that this law is unconstitutional because of the reason that it pronounces excessive penalties for acts which these people have to perform again and again, and which occur in connection with acts which they have to perform. We are here saying that, although this law has not deterred us from coming into court in this case, it may deter us from going on with it to the end, and it may deter other people. A law is settled by what the tendency of the act is that is attacked. If its tendency, its immediate effect, is to prevent persons who occupy particular relations to the public from going into court to test acts, and to prevent them from doing that, because while they are making the test, penalties amounting to millions of dollars may be imposed, then it is unconstitutional.

A street railway company is bound every hour of the twenty-four hours and every minute of each hour to discharge certain relations towards the public (to receive people on the cars and to carry them at a certain rate and under certain conditions); they have no discretion about it. They can not decline to carry passengers or to run cars simply for fear of meeting prosecutions under this act, and to be on the safe side, as an individual could; they are necessarily bound to discharge their duty to the public with respect to all these things occuring every minute of the day, with respect to crowding, with respect to machinery, with respect to speed; they are bound to do it. They are not volunteers. They are bound to do their dnty under the charter, and if they do not do it the charter may be forfeited.

**The Language of the Act Defining the Offenses Which it is Intended to Correct is so General, Uncertain and Indefinite that it Can Not in Itself Constitute a Rule of Conduct or of Law.**

Each one of these alleged ~~31,680~~ 72,000 daily offenses would be of such an intangible and indefinite nature that it would not only be impossible to provide against them in the first place, but absolutely impossible to frame any adequate defense.

Suppose, for instance, that a railroad company is charged on any one day with any of these twenty-four offenses which may be picked at random: Let us say that it is charged with failing to supply a sufficient number of cars on a certain day: On what theory or under what set of facts is it innocent or guilty? What is a sufficient number of cars? Who is to determine, and under what circumstances, whether the cars operated by the company on that given day were sufficient or insufficient? If it be said that the Interstate Commerce Commission is to determine by rules and regulations promulgated, then, even though it be admitted that

they could make reasonable regulations to meet the conditions, nevertheless the vice of the act would be only half cured, for it would still be possible not only to prosecute the defendant for a violation of the regulation but for a violation of the indefinite language of the act itself. And this feature of the law it is impossible to get away from. If the act had provided that the Interstate Commerce Commission should specifically define the general terms of the act for the purpose of carrying out its intent, and that all prosecutions should be for violations of such regulations, then perhaps the only question would be as to the reasonableness of such regulations. But the act, on the one hand, gives the Interstate Commerce Commission no power to define the general terms of the act; and on the other hand, in addition to prosecutions for a violation of regulations made by the commission, it provides also for violations of the general provisions of the act itself. Is this not so? The statute, after specifying what the railroad companies shall do and shall not do, provides that "the Interstate Commerce Commission is hereby given power *to require and compel obedience to all of the provisions of this section,* and to make, alter, amend, and enforce all needful rules and regulations *to secure said obedience.*"

We see, therefore, that the limit of the power of the Commission is to compel obedience, not to such measures looking to the proper operation of the roads and the comfort of the traveling public as they may promulgate, but to the "provisions of this section." Nowhere are they given power to amplify or explain the provisions of the section, but merely to enforce obedience to the more or less specific requirements which the statute itself has provided.

The powers of the commission having been thereby defined, the act provides next that "said commission is given power to make all such orders and regulations

necessary to the exercise of the *powers herein granted* to it as may be reasonable and proper." Again there is no expansion of power to or on the part of the commission, but merely providing it with the necessary authority and means for exercising whatever powers it has been given.

Again, as if to emphasize this construction of the law, the section provides that "such railroad companies . . . are hereby required to obey *all the provisions of this section*, and such regulations and orders as may be made by said commission." And, again: "Any such company or corporation . . . violating *any provision of this section*, or any of the said orders or regulations made by said commission, . . . shall be punished," etc.

But lest there should be any doubt that violations of the act itself are to be considered separate offenses from violations of the regulations of the commission, the Act further provides, "And each day of failure . . . to obey each and all of the provisions and requirements of this section, or the orders and regulations of the Commission made thereunder, shall be regarded as a separate offense."

We therefore confidently assert that there is nowhere to be found in this act any authority granted to the Interstate Commerce Commission to amplify, define, limit, modify, or otherwise explain the offenses charged in the act. Congress did not intend that the commission should have such power. It has never been the policy of the Congress to grant such powers. Whenever it has felt called upon to legislate with respect to what the street railroad companies in the District of Columbia should or should not do, it has specified with great particularity its requirements. When it has felt that the pedestrians in the streets were in need of protection against injury by the street-cars, it has not said that the railroads

should provide such safety devices as the Commissioners of the District of Columbia or someone else should determine to be proper, but it has provided that the street cars in the District of Columbia are "to be provided with proper fenders for the protection of the lives and limbs of all persons within the District of Columbia," and has merely imposed upon the Commissioners the duty of selecting proper fenders.

Again, when Congress determined that the street railways of Washington should provide certain protection to their motormen against inclement weather, it did not say that the companies should provide "comfortable platforms or cars" or should "properly protect its motormen," nor did it use any such indirect or general language, nor leave to any commission or other body to specify what should be done in this respect. On the contrary, it did what it has always done, and what it probably always will do, it jealously reserved to itself to say what standard of compliance with its wishes in this respect should be observed by the railroad companies.

An act approved March 3, 1905, 33 S. L., 1001, entitled: "An act for the relief of street-car motormen" provides as follows:

> "Be it enacted . . . that every person or corporation operating street-cars in the District of Columbia shall provide each of the same with a glass vestibule surrounding as nearly as possible the place where the motorman operating said car stands, so that said motorman shall be protected from inclement weather.
>
> "Section 2. That every person or corporation who or which shall violate the provisions of this Act shall be guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred nor more than five hundred dollars for each and every day any street-car is operated not provided with the vestibule required by this Act: Provided, however, that the requirements of this

> Act shall not apply to cars operated from the first day of April to the first day of November of each and every year."

Many other instances of this practice on the part of Congress might be cited; but perhaps the best illustration is the act in question, which does not confer upon the Interstate Commerce Commission broad powers of regulation, such as would be expected in a public-service commission, but which does attempt with considerable particularity to enumerate, and at length, certain things which the railroad companies shall and shall not do.

Now, it remains to be seen whether the language which Congress has used in the attempt is sufficiently exact and specific to meet the constitutional requirements.

The sixth amendment to the Constitution provides that in a criminal action the defendant shall be advised and informed of the nature and cause of the accusation; that is, the law must first define the offense. The defendant must be advised of the offense and he must be informed of the nature and cause of the accusation when he is brought to the bar of justice to meet a charge which is made in the information or indictment.

This act certainly does not meet this requirement. Is it reasonable or just that a defendant in a prosecution for crime, when the Constitution guarantees to him that he shall be advised of the nature and cause of the accusation, should be compelled to meet a charge of operating, let us say, an unsanitary car, when there are possibly no two people in the world who would agree as to what would constitute a sanitary car? We venture to assert that it would be impossible to find two members of the medical profession, not to mention laymen, who would prescribe with any certainty the same conditions to constitute sanitation in a street-car. If that is true of the

requirement that cars shall be sanitary, what is to be said of the requirement that they shall be comfortable or convenient? In short, could more general and indefinite terms have been found than those used in the act in question defining the offenses? If Congress intended, or still intends, to prescribe certain standards with respect to the number of cars, the condition of sanitation, of cleanliness, of repair, the character of the power and equipment and service, the type of car which would be most comfortable and convenient for passengers, it is perfectly feasible for it to do so. But it has not done so, and in this act it is very far from doing so. And it is respectfully submitted that, in the absence of such prescribed standards, it is unconscionable that the defendant should be prosecuted under conditions which leave it to the whim or caprice or personal fiat or bias of any judge or any jury to set up his or its own standard in the individual case. If the defendant is acquitted today under a charge of operating an uncomfortable car with a given state of facts, there is no guaranty that tomorrow it may not be prosecuted under a precisely similar state of facts and convicted by another judge or another jury.

In the case of Louisville and Nashville Railroad Company against the Commonwealth of Kentucky, 99 Ky., 132, 33 L. R. A., 209, the court had under consideration the question as to the validity of an act of the Commonwealth of Kentucky, which provided that the defendant or the railroad company should not charge more than a reasonable or just rate of fare for passengers. That is, the act says the railroad company should not charge more than a just and reasonable compensation for the benefit of transportation over its line. The act did not say what should be the rate, but simply said that the rate should be just and reasonable. The court held that the law was unconstitutional and void by reason of its uncertainty.

In the course of the opinion, the court say (p. 136):

> "That this statute leaves uncertain what shall be deemed a 'just and reasonable rate of toll or compensation' can not be denied, and that different juries might reach different conclusions on the same testimony, as to whether or not an offense has been committed, must also be conceded. The *criminality* of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged; and this latter depends on many uncertain and complicated elements. That the corporation has fixed a rate which it considers will bring it only a fair return for its investment, does not alter the nature of the act. Under this statute it is still a crime, though it can not be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct. And it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime.
>
> "If the infliction of the penalties prescribed by this statute would not be the taking of property without due process of law and in violation of both State and Federal Constitutions, we are not able to comprehend the force of our organic laws. . . . When we look to the other side of the question we find the contention of the State supported by neither reason nor authority. . . .
>
> "No case can be found, we believe, where such indefinite legislation has been upheld by any court where a crime is sought to be imputed to the accused."

Again, in another case, the case of the Louisville & Nashville Railroad Company *vs.* the Railroad Commissioners of Tennessee, 19 Fed. Rep., page 679, the court had under consideration precisely the same question as in the previous case. The court say (p. 691):

> "Without such legal standard there could be no reasonable approximation to uniform results; the verdicts of juries would be as variant as their prejudices, and this could not be tolerated. To thus regulate the administration of the law to the unrestrained discretion of the jury; . . . would inevitably lead to inequalities and to injustice. . . . We think the property of a citizen—and a railroad corporation is in legal contemplation a citizen—can not be thus imperiled by such vague, uncertain, and indefinite enactments. The corporations and persons against whom this act is directed can do nothing under it with reasonable safety. They may take counsel of the commission, act upon their advice, and honestly endeavor to conform to the statute. But if a jury before whom they are subsequently arraigned shall, in their judgment, and upon such arbitrary basis as they are at liberty to adopt, conclude that the Commissioners misadvised or that the managers of the accused railroad corporation made a mistake in regulating their charges upon a five per cent instead of a four per cent basis, the honesty and good faith of the accused will go for nothing, and penalty upon penalty may be added until the defendant's property shall be gradually transferred to the public."

The force of this language could not be more striking when we contemplate the situation thus presented by the facts in this case. Again, let us remind the court that in spite of regulations which the Interstate Commerce Commission might make, if we concede that they have any such power, defining, amplifying or particularizing the offenses, prosecutions could still be brought

under the general language of the act itself, and, although as the court in the case cited say, the railroad company "may take counsel of the commission, and act upon their advice and honestly endeavor to conform to the statute," and, we might add, to the regulation as well, nevertheless, "if the jury before whom they are subsequently arraigned (for a violation of the statute itself) shall, in their opinion, and upon such arbitrary basis as they are at liberty to adopt, conclude that the Commissioners misadvised, or that the managers of the accused railroad" furnished or operated cars, which, in their judgment, did not comply with the general language of the statute, "the honesty and good faith of the accused will go for nothing, and penalty upon penalty may be added until the defendant's property shall be gradually transferred to the public."

In the case cited, the court, in the opinion, continues as follows:

> "This can not be permitted. Penalties can not be thus inflicted at the discretion of a jury. Before the property of a citizen, natural or corporate, can be thus confiscated, the crime for which the penalty is inflicted must be defined by the law-making power. The legislature can not delegate this power to a jury. If it can declare it a criminal act for a railroad corporation to take more than a 'fair and just return' on its investments, it must, in order to the validity of the law, define with reasonable certainty what would constitute such 'fair and just return.' The act under review does not do this, but leaves it to the jury to supply the omission. No railroad company can possibly anticipate what view a jury may take of the matter, and hence can not know in advance of a verdict whether its charges are lawful or unlawful. One ury may convict for a charge made on the basis of 4 per cent, while another might acquit an accused who had demanded and received at the rate of 6 per cent, rendering the statute in its prac-

> tical working as unequal and unjust in its operation as it is indefinite in its terms. No citizen under the protection of this court can be constitutionally subjected to penalties and despoiled of his property in a criminal or quasi-criminal proceeding under and by force of such indefinite legislation."

And this court, in the case of Czarra against the Board of Medical Supervisors of the District of Columbia, 25 App., D. C., page 443, which was a case in which an act passed to govern the practice of medicine in the District of Columbia was construed, and which provided, among other things, that any licentiate of the board was subject to the revocation of his license upon being found guilty of unprofessional or dishonorable conduct, said (p. 449):

> "The single question to be determined is whether, independently of the causes mentioned, 'unprofessional or dishonorable conduct,' as declared in the act, are sufficiently specific and certain to warrant a conviction thereof and the exercise of the power of revocation by the Board of Medical Supervisors. . . . In all criminal prosecutions the right of the accused to be informed of the nature and cause of the accusation against him is preserved by the sixth amendment. In order that he may be so informed by the indictment or information presented against him the first and fundamental requisite is that the crime or offense with which he stands charged shall be defined with reasonable precision. He must be informed by the law, as well as by the complaint, what acts or conduct are prohibited and made punishable. In the exercise of its power to regulate the conduct of the citizen within the constitutional limitations and to declare what shall constitute a crime or punishable offense, the legislature must inform him with reasonable precision what acts are intended to be prohibited."

Are not these cases identical in principle? Does the act in question providing criminal prosecution for failure to supply and operate a sufficient number of cars, sanitary, in good repair, with proper and safe power, and the other general and indefinite terms, defined with more reasonable precision the crime or offense with which the defendant stands accused than did the act which was declared void for uncertainty for the use of the terms "unprofessional and dishonorable conduct?" Is the accused in this case, rather than in that, "informed by the law as well as by the complaint what acts or conduct are prohibited and made punishable?" Has the legislature in this instance "informed him with reasonable precision" what acts are intended to be prohibited? Certainly in the Czarra case the Board of Medical Supervisors were quite as competent to define what would constitute "unprofessional or dishonorable conduct" as is either the Interstate Commerce Commission, a judge or a jury to say with any degree of certainty and precision what constitutes a sanitary car, a comfortable car, a convenient car, or a sufficient number of cars, under any and all circumstances.

To the same effect is the case of United States *vs.* Reese, 92 U. S., 214, in which the Supreme Court of the United States says:

> "Every man should be able to know with certainty when he is committing a crime. . . .
>
> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who would be set at large. This would, to some extent, substitute the judicial for the legislative department of the Government."
>
> See, also, Stoutenburgh *vs.* Frazier, 16 App. D. C., 229.

In this connection Mr. Justice Brewer, in the case of Chicago & Northwestern Railway Company *vs.* Dey, 35

Fed. Rep., 866, with relation to the constitutionality of the law in question in that case said this (p. 876):

> "Now the contention of the complainant is that the substance of these provisions is, that, if a railroad company charges an unreasonable rate it shall be deemed a criminal and punished by fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what in fact is or what any jury will find to be a reasonable charge. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it."

Other cases holding that criminal statutes were void for the uncertainty with which the offenses were charged are as follows:

Augustine *vs.* State, 41 Tex. Crim. Rep., 59, in which the statute provided that it was a criminal offense to engage in mob violence, but not defining it.

State *vs.* Gaster, 45 La. An. Rep., 636, in which the statute imposed a fine or imprisonment upon any justice, judge, sheriff or other civil official guilty of any misdemeanor, without defining what should constitute a misdemeanor.

State *vs.* Mann, 2 Ore., 238, in which the statute did not define what should constitute the crime of setting up a gaming table.

Ex parte Jackson, 45 Ark., 158, in which the act made it a misdemeanor to commit any offense injurious to the public health or public morals, or to the perversion or obstruction of public justice, or the due administration of the laws. The court's attention is respectfully called to this case as illustrating the argument with respect to the indefiniteness of the term "sanitary" in the act in question.

Hewitt *vs.* Medical Supervisors, 148 Cal., 590, in which the act in question provided that a physician's license to practice could be revoked for making grossly improbable statements in advertising.

It would certainly seem that the offense of "making grossly improbable statements" is equally as definite as any offense charged in the act of May 23, 1908. It might certainly be said that everybody knows what is a grossly improbable statement with quite as much reason as that everybody knows when a street-car is sanitary or in good repair, or is supplied with proper and safe power, or is comfortable or convenient. The court in that case said:

> "It is insisted by petitioner that this particular provision of the act is unreasonable, uncertain and indefinite; that neither the act itself nor the law defines what shall be deemed 'grossly improbable statements;' that the provision in question leaves it entirely to the opinion of the persons who at any time may constitute the board to determine whether a given statement is 'grossly improbable,' *and confers authority upon such board to create an offense under the act and inflict punishment for its commission;* and that for all these reasons this particular provision of the act in question is void: We think this position f the petitioner must be sustained. . . . No definite standard is furnished by the law under this provision whereby a physician with any safety can advertise his medical business; nor is there any definite rule declared whereby after such advertisement is had the Board of Medical Examiners shall be controlled in determining its probability or improbability. The physician is not advised what statements he may make which will not be deemed 'grossly improbable' by the board. No rule is provided whereby he can tell whether the publication he makes will bring him within the ban of the provision or not. The advertisement in connection with his medical business may be made in entirely good faith; the statement may be of such a character that it involves no moral

> delinquency on the part of the physician, nor in any degree tends to deceive or injure the public. These matters, however, have no controlling effect."

In the case at bar the defendant railroad company may act in good faith in attempting, for instance, to supply and to operate a sufficient number of cars to give expeditious passage to all persons desirous of the use of said cars, and yet, after the railroad has done all that it can do in that respect, and when it has had no notice from anyone as to what would be considered a sufficient number of cars to satisfy the act, it can be haled into court to answer a charge for failing in that respect.

The opinion in the case last quoted continues as follows:

> "If, in the judgment of the board, such statements are 'grossly improbable,' the right to practice is forfeited. Instead of furnishing some standard by which the physician can determine in advance what statements shall be treated as 'grossly improbable,' some definition of that term which will be a protection to him in his legal right to advertise his business, the statute, as far as his action is concerned, leaves that matter at large, but provides that, after he has made the advertisement, an *ex post facto* judgment of the board shall determine whether his statement is 'grossly improbable' or not."

**The Said Information Should be Quashed Because it is Not Founded Upon Any Rule, Order or Regulation of the Interstate Commerce Commission Promulgated, Prescribed or Adopted Under the Said Section 16 of the Said Act.**

While it is still maintained that the act in question does not confer upon the Interstate Commerce Commission any authority to further define the offenses enumerated and charged by the act itself, and while counsel do

not intend to be understood as waiving that proposition, but on the contrary are urging that the entire section of the act is void for uncertainty and for the other reasons advanced for which it is unconstitutional, yet if it should be conceded for the sake of argument, as maintained by the court below, that the vice of uncertainty from which the statute suffers might be cured by proper regulations promulgated by the Interstate Commerce Commission, then it nevertheless follows that the information in this case must be quashed because it is not founded upon any such regulation. The Interstate Commerce Commission has in fact made no regulation defining the term "crowding" used in the act. The general argument upon the uncertainty of the terms defining the various offenses provided by the act which has preceded is equally applicable, of course, for the purpose of showing that this particular offense, namely, the failure to operate this particular car so as to avoid crowding, is incapable of enforcement because of its uncertainty, merely as a violation of the act itself.

With respect to this particular language, however, it may also be said that no one can say with any degree of precision or accuracy what would constitute the crowding of the car. Is there any hint in the statute itself or in any prescribed definition of the word which would enable the defendant railroad company beforehand to know what is to be considered the crowding of a car? Is there any standard set up by which it can govern its conduct in this respect? Is there any regulation limiting the number of passengers upon any particular type or class of car? Is there any standard fixed by any authority regulating the number of persons who may occupy any given car or any given type of car? In fact, is there anything whatever that advises the railroad company before the commission of the act, that the act itself might be considered by a jury or by a judge a violation of law?

That this term "crowding," like the other general terms of the act, needs further definition before the prohibition against it can be enforced is well illustrated by the regulations which the Interstate Commerce Commission have already passed. Take, for instance, Regulation No. 11, evidently further interpreting the term "convenient," which is as follows:

> "11. All new street railway cars placed in service within the District of Columbia after January 1, 1909, and having a distance from the car floor to the rail of more than 30 inches shall be provided with two steps between the rail and the car floor. No step of any type of car placed in service after above-named date shall have a rise of more than 16 inches."

Also regulation No. 12-A further interpreting the word "comfortable" which is as follows:

> "12-A. All closed cars that are operated in the District of Columbia between December 1, 1908, and April 1, 1909, and between November 1 and April 1 of each year thereafter, and which are equipped with heating apparatus which can be used, shall have such heating apparatus in operation whenever the outside temperature is lower than 40 degrees Fahrenheit above zero, and shall be warmed to a temperature not less than 40 degrees Fahrenheit nor more than 60 degrees Fahrenheit above zero."

Is it not as feasible for the commission to have promulgated a regulation defining the word "crowding" and to have prosecuted thereunder, as to have done as they have with respect to these two words "comfortable" and "convenient?"

In the absence of such action by the commission, the very serious question arises whether the railroad company itself can establish any arbitrary limit upon the capacity of its cars. Can it say, for instance, in the case of the car which has forty passengers aboard, to the forty-first man, who wishes to take passage thereon, that

he can not do so, that the car is full? If such passenger insists on boarding such a car, what is to be done about it? Can the railroad company eject him? And if so, could it defend under this act? Could the railroad company say, "We kept you off that car in pursuance of the language of the act of May 23, 1908, which says that cars shall not be crowded?" Would not the railroad company be subject to a suit for damages in every case of this kind? And would not the intending passenger be entitled to recover because there would be no justification on the part of the railroad company in putting that man off the car, or refusing to allow him to get on? If so, where is the railroad company to draw the line? And, *reductio ad absurdum*, if the railroad company itself is to draw the line, what is the purpose of the act? If the company is to fix its own standards by which it is to become known when a car is crowded, then is not this legislation perfectly futile and meaningless?

But it is respectfully submitted that a street railway company has no such authority. There is no law today in force in this District which authorizes the defendant here to physically prevent a man from getting on its car, and until a law is passed which will make it a penal offense, justifying arrest, for a passenger to get on a car when a certain condition of things exists, of which he is publicly notified by a sign, or something of that kind, then if you attempt to say that the company must put such persons off the cars when they get on, you are imposing upon the company an impossible task?

As illustrative of this situation, the case of Bridges *vs.* Jackson Electric Railway, Light & Power Co., 86 Miss., 584, 38 Southern Rep., 788, is in point. The court say:

> "He (the passenger) was guilty of negligence in exposing himself, without cause, and without the procurement of appellee, to an obvious danger, and was none the less guilty of such negligence,

> simply because the servants of appellee did fence him off from it. In the case of Indianapolis R. R. Co. *vs.* Rutherford, 92 Am. Dec., 336, the court held that the duty of the carrier does not extend to barricading its cars and imprisoning its passengers so as to prevent them, by their recklessness and folly, from voluntarily exposing themselves to needless perils or obvious dangers. Such a doctrine would give power to railway officials to so restrain the liberty of their passengers in every respect that they could not, by any act of their own, put themselves in unnecessary danger, for such a power must necessarily exist if the duty to exercise it exists. . . . *The obligation to answer in damages can not be separated from the authority to do what is necessary to avoid liability.* Carriers have not and ought not to have any such powers, and hence no liability results. Their passengers are not their slaves. Though passengers, they are nevertheless free men."

And, so again, in the case of Hickey *vs.* Boston and Lowell R. R. Co., 14 Allen, 429, the court says:

> "If sufficient and suitable provision be made within the cars for all the passengers, the managers of the train are not under obligation to restrict them to their proper places, nor to prevent them from acts of imprudence. If they voluntarily take exposed positions, with no occasion therefor nor inducement thereto caused by the managers of the road, except a bare license by non-interference, or express permission of the conductor, they take the special risks of that position upon themselves."

So we say that the language of this act, without any assistance by regulation of the Interstate Commerce Commission or other law-making authority, attempts to force this defendant to do an impossible thing.

When the cars start, for instance, from the base ball grounds, or when in the afternoon, having stopped, let

us say at the Treasury Department, Pension Office, Government Printing Office or other place employing large numbers of persons, with the influx of clerks coming therefrom, it is a physical impossibility to prevent crowding. To prevent it twenty or more conductors, each charged with the police power under the law, would be necessary. If they attempted it without that express provision of law, giving them power as police officers to make arrests, or to eject the passengers from the cars, or to use the force necessary to do so, the carrier would be met in every case by the assertion that it was acting without authority, and that assertion would be correct. It is not right to keep a man from getting on the car simply on the ground that he is crowding it.

Now, as a matter of fact, who crowds the cars? Does the railway company crowd them? or do the passengers who insist upon getting the first car that comes along crowd them? If, indeed, the Interstate Commerce Commission had in fact promulgated a regulation providing the number of cars that should be operated by the railway company at a given time and upon a given line for the purpose of meeting the requirements of the act, and the railroad company itself had complied with such regulation, and had, we will say, on Fifteenth street, northwest, within the two blocks between New York avenue and Pennsylvania avenue, or on F street between Ninth and Fourteenth streets, at a given time, say, fifteen cars, what is there to prevent persons who desire to take passage from crowding to the very limit of their capacity the first cars in the line, and leaving those immediately behind and waiting for them practically empty? Is this an uncommon condition, and is it the railroad company that is crowding the cars under such circumstances? Indeed the Interstate Commerce Commission itself so fully realized the futility of this legislation and the utter hopelessness of correcting the condition or of even

establishing regulations which would tend to correct it, that, on January 18, 1909, in its official report to Congress, being public document H. R. No. 1336, Sixtieth Congress, second session, entitled "Report of the Interstate Commerce Commission on the Street Railroads in the District of Columbia," on page 15 of said report it said:

> "The commission realizes that one of the principal requirements of the act under which the Interstate Commerce Commission has proceeded was the remedying of the overcrowded condition of the cars, the exact language of the law being 'with proper and safe power, equipment, appliances, and service, comfortable and convenient . . . without crowding said cars.' Within a brief time after the commission had undertaken the work imposed upon it by the Interstate Commerce Commission the question of operating cars without crowding was taken up, and for three or four months the matter has been a subject to which the commission has given its closest and most earnest attention. Reports received through the courtesy of the State Department from United States consuls in various European cities bearing upon the question of overcrowding cars have been received and considered, while correspondence has been entered into between the commission and the municipal authorities of more than twenty of the leading cities in this country, with a view of learning, if possible, from the experience of those municipalities. The result of this investigation discloses the fact that in almost every city in this country and abroad, except in France, the question of overcrowding cars is one which the authorities have been endeavoring to solve and remedy, but that, as a matter of fact, despite all laws and regulations, the conditions which caused such widespread complaint have not yielded to any solution which it has been possible to bring to bear upon the situation."

The court is probably aware of the fact that in France, which is made the exception in this report, it is a penal

offense for a passenger to enter into a public conveyance of the kind when every seat is filled.

It will be well in this connection to see with what particularity or precision the crime of crowding charged in this information can be defined. Legal terms are the definitions, of course, of common ideas, but they are also, for the safety of the citizen, to be interpreted judicially. Fortunately, they are subject to judicial ideas and judicial definitions. When a man is indicted for murder we don't go to Webster's dictionary to find out what "murder" means. How many laymen have a competent idea of what murder is? How many laymen, and we may say how many judges, have a perfectly clear idea as to what the word "malice" in law, that is the legal term "malice," means? It is not the "malice" of the dictionary. Even if a man is justified in killing under the law, he may have all the actual malice in his heart that could possibly get into any vindictive man's breast, but that would have nothing to do with the legal malice that is used in the law books, that we must read, if we would learn what murder is in the eye of the law. A man is held under the law to know what malice is, not from what he finds in the dictionary, but from what he finds in the decisions of the courts. So, when we come to embezzlement, we don't determine whether or not a man is to be prosecuted by the definition that is found in the dictionary. We must find in the decisions of the courts what circumstances constitute embezzlement. When we come to indict for grand larceny, or petit larceny, do we take the dictionary definition of stealing? And so as to all the common law felonies. We don't go to the dictionary for them. We can not rest on any general definition of them. We rest only on what the decisions of the courts have been with respect to them.

Now, it is admitted, of course, that there is no judicial interpretation of the crime or misdemeanor of "crowd-

ing" as used in this statute, but if we are to go to the dictionary for our meaning of the term we are quite as hopelessly bewildered. The Standard Dictionary of the English language gives five different definitions of the word "crowd," as follows:

> "1. Fill with or as a crowd to overflowing; packed; as the multitude crowded the church.
>
> 2. To squeeze closely together; cram; as, they crowded into a small room; we were greatly crowded.
>
> 3. To shove along; push; especially against something; as, you are crowding me against the wall.
>
> 4. To throng together; come closer together in numbers; assemble in multitudes.
>
> 5. A numerous collection of persons or things gathered closely together, multitude; as, an immence crowd; what a crowd of carriages."

Then, in Webster's Dictionary, there are several different definitions of what is a crowd, all along the same general line, and all of which show that the defendant can not be advised beforehand as to what constitutes a crowd.

**The Offense Intended to be Constituted by the Act was and is Not the Crowding of Any Particular Car, But the Failure on the Part of Any Street Railway Company to Supply and Operate a Sufficient Number of Cars to Give Expeditious Passage Without Crowding Said Cars.**

It has already been shown, not only by the instances cited by counsel and the arguments advanced, but conclusively by the official reports of the Interstate Commerce Commission itself, that the crowding of particular cars is impossible to prevent, and it can not be presumed, when we are interpreting a statute, that Congress intended to provide that the railroad companies and the

Interstate Commerce Commission should do an impossible thing. It is, therefore, only reasonable to suppose that what Congress attempted to do, whether or not it may have succeeded, or may have failed by the unfortunate use of language not suited to the purpose, was to compel the railroad companies to supply a sufficient number of cars to accommodate the traffiic; a sufficient number of cars to enable all persons who wish to ride to do so, and to do so without being crowded if they should so prefer.

It would seem that Congress realized the futility and impossibility of preventing persons from boarding an already crowded car, if they chose to do so, but Congress did purpose to give such persons an opportunity to board a car which was not crowded, if they chose to select such a car. In other words, Congress, in effect, said to the prospective passengers: "Here are cars sufficent for all of you to occupy without being crowded," but Congress, unfortunately, has not said to them: "You must distribute yourselves among these cars so that no single car will be crowded." Perhaps Congress thought that when they had provided that the patrons might have sufficient cars for their accommodation, if they desired so to use them, it had gone far enough, and that they did not care to say to the free-born American citizen that he should not have the privilege of getting home from his labor one minute or two minutes earlier by standing in the aisle of a car, or on the platform, if he so desired. The least that can be said is that this interpretation of the act is a reasonable one, and if the act had afforded any means for determining the number of cars which would be required under given circumstances, it would have been very easy of enforcement. It is unfortunate perhaps that the Interstate Commerce Commission was not given the necessary authority to reasonably regulate this

matter, but the fact remains that no such authority has been given, and, although the act unquestionably provides that the railroad company shall supply a sufficient number of cars . . . so as to give expeditious passage to all persons desirous of the use of said cars, without crowding said cars, it has utterly failed to provide any means by which that sufficient number can be determined.

Again, the Interstate Commerce Commission seems to have clearly understood that their function was not to prosecute the railroad companies for crowding or allowing to become crowded certain particular cars which they themselves admit it is impossible to prevent, but that their interpretation of the act is just as contended for herein, for they say:

> "The act itself seems to bear intrinsic evidence that it was not the purpose of Congress to vest such authority in the Commission, *our power being limited to the making of rules and regulations which shall insure a sufficient number of comfortable and convenient cars and their operation at such speed as to give expeditious passage.*"

And the commission also seems to realize that the language of the act is too general and uncertain to permit of its enforcement, for they say:

> "In view of the uncertain language of the act, we suggest that it be so amended as to clearly indicate what power, if any, in this regard the Congress wishes to bestow upon that body to which the regulation of car service within this District may be granted."

As the Capital Traction Company is also appellee in a similar cause now pending before this court, in which precisely the same questions of law are

involved, and as counsel for both street railroad companies have collaborated in the preparation of this brief, it is signed by counsel for both roads.

Respectfully submitted.

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